

The Honorable Karen A. Overstreet
Chapter 11

Hearing Date: December 6, 2013
Hearing Time: 9:30am
Location: Courtroom 7206
Response Date: **November 27, 2013**

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF WASHINGTON, AT SEATTLE

In re:

NATURAL MOLECULAR TESTING
CORPORATION,

Debtor.

No. 13-19298-KAO

**MOTION FOR ORDER
AUTHORIZING THE EXTENSION
OF STAY AS TO THE OFFICERS OF
THE DEBTOR**

Natural Molecular Testing Corporation, debtor-in-possession herein (the “Debtor” or “Natural Molecular”), by and through counsel, HACKER & WILLIG, INC., P.S., respectfully moves the Court for an order authorizing the extension of the automatic stay to any action against the Debtor’s officers and principals for a period of no less than 180 days following the filing of the petition herein. This Motion is based upon the files and records herein and upon the supporting Declaration of Keith Tyacke (“Tyacke Decl.”), filed concurrently herewith.

I. BACKGROUND INFORMATION

The Debtor commenced this Chapter 11 case on October 21, 2013 (the “Petition Date”). The Debtor is operating its business and managing its affairs as a debtor-in-possession under 11 U.S.C. §§ 1107 and 1108. *See*, Tyacke Decl., ¶ 3. A summary of the

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Debtor's operations and the events leading to this Chapter 11 are set forth in the prior-filed Declaration of Keith Tyacke dated October 22, 2013 [Dkt. #7].

The Debtor is currently defending the following lawsuits:

- a. Roger Rodkey d/b/a Genetic Pathways v. Natural Molecular Testing Corporation and Beau Fessenden
14th Judicial District Court
Dallas County, Texas
Cause No. DC-13-09624
- b. HDSherer, LLC and Hugh Duncan Sherer v. Natural Molecular Testing Corporation
United States District Court for the District of South Carolina
Civil Action No. 2:13-cv-00561-PMD
- c. Clinical Micro Sensors, Inc. (GenMark) v. Natural Molecular Testing Corporation and Beau Fessenden
United States District Court for the Southern District of California
Civil Action No. 12CV02366-DMS-RBB
- d. Cherian, LLC v. Natural Molecular Testing Corp
17th Judicial Circuit Court, Broward County, FL
Case No. CACE13020501
- e. Genopath Solutions, LLC v. Natural Molecular Testing Corporation
United States District Court for Northern District of Alabama,
Northern Division
Case No. 5:13-cv-01896-JEO
- f. Pharmacogenomics Testing, LLC and South Texas Spinal Clinic, P.A. v. Natural Molecular Testing Corporation
45th Judicial District Court, Bexar County, San Antonio, Texas
Case No. 2013-CI-16069
- g. A. B. Williams, Inc., v. Natural Molecular Testing Corporation
United States District Court for the Southern District of Mississippi,
Hattiesburg Division
Case No. 2:13-cv-00222-KS-MTP

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1 Two of the existing lawsuits name both the Debtor and its President Beau Fessenden
2 as defendants. First, in the *Genetic Pathways* litigation pending in the 14th Judicial District
3 Court, Dallas County, Texas, the Debtor and Mr. Fessenden are being sued for alleged breach
4 of contract, an accounting of amounts allegedly owed to certain former sales representatives of
5 the Debtor, tortious interference, conversion, unjust enrichment, violations of the Texas Theft
6 Liability Act, Exemplary Damages, and attorneys' fees and costs. Additionally, Mr. Fessenden
7 is being sued for slander and libel. *See*, Tyacke Decl., ¶ 4. With the exception of the claims for
8 slander and libel, which appear to form a minor part of the existing litigation, all claims are
9 joint and are derived from the operation of the Debtor's business. Defense of the claims,
10 which the Debtor disputes, will, of necessity, require participation of the Debtor. Allowing
11 claims to move forward against Mr. Fessenden will essentially and effectively lift the stay with
12 respect to the Debtor as well.

13 In the *GenMark* litigation, the Debtor and Mr. Fessenden are being sued for alleged
14 breach of contract; violations of Unfair Competition Law, Business and Professions Code;
15 Conversion; Goods Sold and Received; and Quantum Meruit. *See*, Tyacke Decl., ¶ 5. All
16 claims relate to or are derived from the operation of the Debtor's business. As described
17 above, all such claims are derivative, and for any defendant to proceed on any claim against
18 Mr. Fessenden, that defendant would first need to prevail on such against the Debtor.

19 Without regard to the merits of the lawsuits pending against the Debtor and/or Mr.
20 Fessenden, if Mr. Fessenden is forced to defend these lawsuits, and any others filed, during the
21 course of the bankruptcy proceeding, his attention will be drawn away from the necessary task
22 of preparing, leading, and seeing through the Debtor's reorganization efforts, which is, as the
23 below case law demonstrates, valuable to the public interest. *See*, Tyacke Decl., ¶ 6. Likewise,
24 because the claims relate primarily or exclusively to the Debtor's business and operations
25 defending such claims as to Mr. Fessenden will require the participation of the Debtor.

26 Therefore, all above-referenced lawsuits should be stayed by the Debtor's filing herein,

1 and further action against Mr. Fessenden or other of the Debtor's principals should similarly
2 be stayed for a period of 180 days following the Petition Date, with extension of such stay as
3 to the Debtor's principals beyond this initial period by order of the Court.

4 II. LEGAL AUTHORITY & ARGUMENT

5 Regarding the powers of the Bankruptcy Court, 11 U.S.C. § 105(a) provides as follows:

6 The court may issue any order, process, or judgment that is necessary or
7 appropriate to carry out the provisions of this title. No provision of this title
8 providing for the raising of an issue by a party in interest shall be construed to
9 preclude the court from, sua sponte, taking any action or making any
10 determination necessary or appropriate to enforce or implement court orders or
11 rules, or to prevent an abuse of process.

12 *See*, 11 U.S.C. § 105(a) (West 2013 ed.).

13 A temporary extension of the automatic stay to the Debtor's officers is necessary and
14 appropriate to carry out the provisions of this Chapter 11 case, which extension of the stay
15 should apply to all matters referenced under 11 U.S.C. § 362(a)(1)-(8). A court may invoke §
16 105(a) "if the equitable remedy [of extension of the stay] itself is demonstrably necessary to
17 preserve a right elsewhere provided in the Code." *In re Nosek*, 544 F. 3d 34, 43 (1st Cir. 2008)
18 (citations omitted). *Solidus Networks, Inc. v. Excel Innovations, Inc. (In re Excel Innovations, Inc.)*, 502
19 F.3d 1086, 1093-1095 (9th Cir. 2007). *See also*, *Canter v. Canter (In re Canter)*, 299 F.3d 1150,
20 1155 (9th Cir. 2002); *Ingersoll-Rand Fin. Corp. v. Miller Mining Co.*, 817 F.2d 1424, 1427 (9th Cir.
21 1987). In addition, "[a] bankruptcy court may use its equitable powers to issue injunctive relief
22 against proceedings in other courts when the bankruptcy court is satisfied that such
23 proceeding would either defeat or impair its jurisdiction with respect to a case pending before
24 it." *In re: Johns-Manville Corp.*, 26 B.R. 420, 425 (Bankr. S.D.N.Y. 1983).

25 Courts look to four standard factors a movant must satisfy to obtain injunctive relief
26 under 11 U.S.C. § 105(a): (1) that the debtor would suffer irreparable injury if the injunction
were not granted; (2) that such injury outweighs any harm which granting injunctive relief

1 would inflict on a defendant; (3) that the debtor has exhibited a likelihood of success on the
2 merits; and (4) that the public interest will not be adversely affected by the granting of the
3 injunction. See, *Solidus Networks*, above. See, *In re Codfish*, 97 B.R. 132, 135 (Bankr. D.P.R.
4 1998), citing, *In re Supermercado Gamboa, Inc.*, 68 B.R. 230, 232 (Bankr. D.P.R. 1986); *In re R&G*
5 *Fin. Corp.*, 441 B.R. 401, 410 (Bankr. D.P.R. 2010).

6 Here, irreparable harm or injury will be sustained to the Debtor's reorganization efforts
7 if the continuation of proceedings against Mr. Fessenden, individually, are not stayed. First,
8 Mr. Fessenden's time and energy would be distracted both from continuing, repairing, and
9 growing the Debtor's daily business affairs; and from undertaking the time and dedication
10 necessary to progress the Debtor toward a confirmable plan of reorganization. The initial
11 180-day period would go a long way to accomplishing same. Mr. Fessenden founded Natural
12 Molecular in 2008 and has been involved in the daily affairs of the corporation since that time.
13 Mr. Fessenden guides all aspects of the corporation as its President and CEO, has done so
14 since its inception, and will continue to do so throughout the course of the confirmed Chapter
15 11 plan. See, Tyacke Decl., ¶ 7.

16 The "likelihood of success" factor has been defined, for purposes of an injunction in a
17 bankruptcy case, as the probability of a successful plan of reorganization. See, *First Bank P.R.*
18 *Inc. v. Foti (In re Int'l Home Prods.)*, 491 B.R. 607, 624-627 (Bankr. D.P.R. 2013). Here, without
19 the dedicated effort of Mr. Fessenden, the probability of a successful plan of reorganization is
20 relatively low. See, *Johns-Manville*, 26 B.R. at 426 (in which the bankruptcy court issued a
21 temporary stay of litigation brought against the debtor's officers, directors, and employees,
22 noting that "[t]he massive drain on these numerous individuals' time and energy at this crucial
23 hour of plan formulation in either defending themselves or in responding to discovery
24 requests could frustrate if not doom their vital efforts at formulating a fair and equitable plan
25 of reorganization").

26 The Debtor intends to identify the problems that precipitated its present financial

1 difficulties and has already spent substantial time in an attempt to restructure same, which will
2 be redirected into its eventual proposed plan and reorganization. The implementation of a
3 plan will require the expenditure of substantial time, energy, and funding by Mr. Fessenden.
4 *See*, Tyacke Decl., ¶ 8.

5 Defense of the claims asserted against the Debtor and Mr. Fessenden, which the
6 Debtor and Mr. Fessenden dispute, will, of necessity, require participation of the Debtor.
7 Allowing claims to move forward against Mr. Fessenden will essentially and effectively lift the
8 stay with respect to the Debtor as well. Most importantly, all such claims are derivative, and
9 for any defendant to proceed on any claim against Mr. Fessenden, that defendant would first
10 need to prevail on such against the Debtor.

11 Also, the public interest is best served by promoting a successful reorganization in
12 bankruptcy. *See*, *Lazarus Burman Assocs. v. National Westminster Bank USA (In re Lazarus Burman*
13 *Assocs.)*, 161 B.R. 891, 901 (Bankr. E.D.N.Y. 1993).

14 Additionally, if the lawsuits against the Debtor and Mr. Fessenden are allowed to
15 proceed, Mr. Fessenden and numerous other members of his staff will have to take time out
16 of their schedules to continue the Debtor's valuable daily business operation to respond to the
17 needless demands of the lawsuits. Mr. Fessenden and his employees will also effectively take
18 on the role of defending the Debtor as most causes of action raised in the *Genetic Pathways*
19 litigation and in the *GenMark* litigation are common to both the Debtor and Mr. Fessenden. If
20 the Debtors employees and its President are forced to come together to expend resources and
21 defend the lawsuits, it will be as if no stay is in effect, for either the Debtor or Mr. Fessenden,
22 which will have adverse economic consequences for this estate. *See*, Tyacke Decl., ¶ 9. *See*,
23 *Queenie, LTD. v. Nygard Int'l*, 321 F.3d 282 (2d Cir. N.Y. 2003) ("the automatic stay can apply
24 to non-debtors, but normally does so only when a claim against the non-debtor will have an
25 immediate adverse economic consequence for the debtor's estate."). Such will be the case
26 here.

1 Finally, there exist the “unusual circumstances” in which to justify an extension of the
2 automatic stay to non-bankrupt, co-defendants, as contemplated in *A.H. Robins Co. v. Piccinin*,
3 788 F.2d 994 (4th Cir. Va. 1986). “An illustration of such a situation would be a suit against a
4 third-party who is entitled to absolute indemnity by the debtor on account of any judgment
5 that might result against them in the case. To refuse application of the statutory stay in that
6 case would defeat the very purpose and intent of the statute.” *Id.* at 999. Here, Mr. Fessenden
7 is entitled to indemnity by the Debtor. *See*, Tyacke Decl., ¶ 10.

8 Therefore, the automatic stay should be extended to Mr. Fessenden, the President of
9 the Debtor, and the Debtor’s principals, for a minimum of 180 days following the Petition
10 Date to allow the Debtor to prepare, unhindered, its plan of reorganization and bankruptcy,
11 generally. This type of discretionary stay is relative common. *See, e.g., Chord Associates, LLC, et*
12 *al. v. ProTech 2003-D, LLC, et al.*, 2010 U.S. Dist. LEXIS 28465 (2010).

13 III. CONCLUSION & PROPOSED ORDER

14 WHEREFORE, the Debtor respectfully requests entry of an order authorizing stay as
15 to officers of the Debtor. A proposed Order consistent therewith is attached hereto as
16 **Exhibit A.**

17 DATED this 8th day of November, 2013.

18 Respectfully submitted,

19 HACKER & WILLIG, INC., P.S.

20
21 /s/ Charles L. Butler, III

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25 Attorneys for the Debtor
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